IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

Whitney Paxton and Jeff Reeser,	)	
Plaintiffs,	)	**Case No. 3:16-cv-523**
v.	)	**Judge Mattice**
Bluegreen Vacations Unlimited, Inc., Philip Hicks and Todd Smith, Individually,	)	**Magistrate Judge Guyton**
Defendants.	)	

DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION

Defendants Bluegreen Vacations Unlimited, Inc. ("Bluegreen"), Philip Hicks ("Hicks") and Todd Smith ("Smith") (collectively, "Defendants"), pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636 file the following objections to the Report and Recommendation dated July 27, 2017, (Docket No. 41).

Specific Objections to the Report and Recommendation of July 27, 2017

1. Defendants object to the Report's findings that Florida employees should be part of the conditionally-certified class. (Docket No. 41, at 11.)

2. Defendants object to the Report's findings that Front-Line Sales Representatives should be part of the conditionally-certified class. (Docket No. 41, 10-11.)

ARGUMENT[1]

I. Florida Employees Should Not Be Part of the Conditionally-Certified Class

[1] Defendants also incorporate the arguments made and evidence presented in *Defendants' Response in Opposition to Plaintiffs' Motion for Conditional Certification* (Docket No. 31) and *Defendants' Supplemental Response in Opposition to Plaintiffs' Motion for Conditional Certification* (Docket No. 38).

A. The Florida employees are not similarly situated.

The differing factual and employment setting of the Front-Line Representatives, In-House Sales Representatives, and In-House Sales Specialists in the Florida location make their inclusion in a conditionally-certified class inappropriate. The Report recommends the inclusion of employees from Bluegreen's The Fountains resort in Orlando, Florida, because the declarations submitted by former employees from that location "preliminarily demonstrated that they performed similar duties, regularly worked in excess of forty hours a week, their supervisors were aware that they worked over forty hours per week and they were similarly compensated by a pay system that included commissions but not overtime." (Docket No. 41, at 11.) However, when considered in context, the Florida employees do not share enough similarities with the Tennessee employees to warrant their inclusion as part of the conditionally-certified class.

The Florida employees have a different reporting structure and do no share management with any of the Tennessee employees. In-House Sales Representatives in Tennessee report directly to In-House Sales Manager Todd Smith at the Laurel Crest Resort. (Hicks Dec. ¶2.) Front-Line Sales Representatives are the responsibility of Director of Sales, National Sales & Marketing for Bluegreen, Philip Hicks. (Hicks Dec. ¶1.) In Florida, the Director of Sales, Ken Morgan, is responsible for both Front-Line and In-House Sales Representatives. (Morgan Dec. ¶2.) Neither the Tennessee declarants nor the Florida declarants identify a decision-maker or supervisor common to both states.

In-House Sales Representatives in Tennessee are also subject to travel obligations that Florida In-House Sales Representatives are not. Tennessee has two operations, its Laurel Crest Resort and the Smoky Mountain Preview Center. (Hicks Dec. ¶2.) In-House Sales Representatives have times when they must travel from the Laurel Crest Resort to the Smoky

Mountain Preview Center to complete paperwork associated with ownership upgrades. (Hicks Dec. ¶7.) The In-House Sales Representatives are compensated for this time. (*Id.*) There are no such travel obligations for In-House Sales Representatives in Florida as they operate at The Fountains Resort where the preview center is also located. (Morgan Dec. ¶¶1-2.) Thus, the day-to-day operations in Florida differ in material respect to those in Tennessee.

B. The Florida Employees Alleged FLSA Violations Are Inconsistent

The declarations from the Florida employees are at odds with one another and with the Tennessee declarants, which demonstrates they should not be part of the conditionally-certified class. The Plaintiffs must allege commonalities between the basis of their claims and those of the "potential claims of the proposed class *beyond the mere facts of job duties and pay provisions*.'" *Jackson v. Papa John's USA, Inc.*, No. 1:08-CV-2791, 2008 U.S. Dist. LEXIS 107650, at *13-14 (N.D. Ohio Feb. 13, 2008) (quoting *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002)) (emphasis added). Absent such a required showing, "it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse." *Id.* at *14. "Absent some factual showing that similarly situated employees actually do exist or that the defendant's pay practices were consistent, conditional certification is improper." *Jungkunz v. Schaeffer's Inv. Research Inc.*, No. 1:11-cv-00691, 2014 U.S. Dist. LEXIS 43490, at *37-38 (S.D. Ohio Mar. 31, 2014).

The Florida declarants only allege "sales representatives" were not allowed to claim their overtime hours. (Vasquez Dec. ¶15; Robles Dec. ¶16; Martinez Dec. ¶16.) The only explanation they provide is that they were told they could not "claim hours over forty (40) in a workweek, but do what you have to do to get the job done." (Vasquez Dec. ¶15; Robles Dec. ¶16; Martinez Dec. ¶16.) Even accepting these allegations as true, there is nothing in the pleadings or declarations that describe how the Florida Employees were denied overtime. They merely allege they were not allowed to claim overtime hours and they were told to complete their work without accruing overtime. They do not allege their time sheets were edited, they do not allege they were told to clock out and keep working. The Florida declarants must to more than make a bare-bones claim that they suffered a FLSA violation. *See Ledbetter v. Pruitt Corp.*, 2007 U.S. Dist. LEXIS 10243, at *14-15 (M.D. Ga. Feb. 12, 2007) (holding that "[s]imply claiming a violation of the FLSA will not suffice to meet the 'similarly situated requirement'").

These allegations differ materially from the allegations in the declarations by the named Plaintiffs. Paxton alleges Bluegreen did not allow "sales representatives" to claim all hours worked because Phillip Hicks and Todd Smith would not let "sales representatives claim hours over forty (40) in a workweek." (Paxton Dec. ¶13.) She also claims "[m]any times, they would pass around a weekly time sheet adjustment and have sales representatives purposefully reduce their actual hours" below forty for the week. (*Id.*). Jeffrey Reeser provides a different assessment, stating "I was not paid overtime compensation at the rate of one and one-half times my regular rate of pay for the hours I worked over 40 in a workweek." (Reeser Dec. ¶8.) Unlike Paxton, the Florida declarants do not provide any mechanisms by which they were denied overtime such as time card alteration or requirements that they work off the clock before, during, or after work. *See Shipes v. Amurcon Corp.*, No. 10-14943, 2012 U.S. Dist. LEXIS 39794, at *18-19 (E.D. Mich. Mar. 23, 2012) ("Although proof of class members' claims will inevitably be individualized, these claims will be 'unified by common theories of defendants' statutory violations,' that is, 'improperly editing time sheets.'") (quoting *O'Brien*, 575 F.3d at 585). They only state they worked more than forty hours and were not paid for overtime. The Complaint itself is devoid of reference to Florida or the Florida employees, and its allegations do not reference them. (*See generally* Docket No. 1.)

The Report cites *Waggoner v. U.S. Bancorp*, 110 F. Supp. 3d 759, 770, to support the inclusion of Florida employees because of their alleged similar duties, work in excess of 40 hours per week, knowledge of the excess work by supervisors, and compensation that did not include overtime. *Waggoner* is distinguishable from the present situation in two significant respects. First, only one position across the various locations was sought as part of the collective ("co-managers"). *Waggoner*, 110 F. Supp. 3d at 767. Second, the central issue was that all co-managers were allegedly misclassified as exempt – a commonality between all prospective class members regarding their overtime pay that does not exist in this case. *Id.* Even in the collective certified in *Thompson v. Direct General Consumer Products, Inc.*, No. 3:12-cv-1093, 2014 WL 884494 (M.D. Tenn. Mar. 5, 2014), the allegations in the various declarations from the states included in the certified collective action supported one another by stating nearly "the same thing." *See Thompson*, 2014 WL 884494 at *5 (noting affiants provided statements supporting supervisors telling them to make "overtime hours lower in the records but to keeping [*sic*] working to get the job done" and supervisors "would e-mail me telling me to adjust my time closer to 40 hours"). The divergent nature of the Florida declarants and the sparseness of their allegations should preclude them from being part of the conditionally-certified class.

C. The Fairness and Procedural Impact of Including Florida Employees Favors Their Exclusion from The Conditionally-Certified Class

In deciding whether to conditionally certify a class, the court also considers "the degree of fairness and procedural impact of certifying the action as a collective action." *O'Brien*, 575 F.3d at 584. The Florida employees are in a different state, with different supervisors, and work in a facility that differs in key respects with the Tennessee employees. Including the Florida employees is unfair to Bluegreen as it requires the company to litigate disparate claims in unrelated locations with different supervisors and employment settings. There is not overarching connection between the employees of the two states, and the declarants from each state do not identify a common practice or policy uniting their claims other than a general, underlying allegation they were not paid overtime. Counsel for Plaintiffs stated during oral argument that the addition of the Florida employees to this action was for their convenience; that is not a factor to be considered when determining whether a collective should be certified. The practical burden on Bluegreen in handling two disparate groups within one class outweighs any theoretical convenience to the Florida employees in having their allegations addressed in Tennessee.

II. Front-Line Sales Representatives Should Not Be Included In Any Collective Action

The Report errs in recommending Front-Line Sales Representatives be included in the conditionally-certified class. One of the factors considered by the *O'Brien* court is "the factual and employment settings of the individual plaintiffs…." 575 F.3d at 584. Front-Line Sales Representatives have different employment settings than In-House Sales Representatives. Even if Front-Line Sales Representatives are included in some fashion, Front-Line Sales Representatives from Tennessee should not be part of the conditionally certified class because Plaintiffs have not presented evidence regarding Front-Line Sales Representatives in Tennessee during the statute of limitations period.

Most significantly, the Plaintiffs fail to provide evidence regarding Front-Line Sales Representatives in Tennessee, and what evidence is provided shows Front-Line Sales Representatives are different from In-House Sales Representatives. It is the Plaintiffs' burden to at least demonstrate "that similarly situated employees actually do exist[.]" *Jungkunz*, 2014 U.S. Dist. LEXIS 43490, at *37-38. Neither named Tennessee plaintiff worked as a Front-Line Sales

Representative during the statute of limitations period for this action. During the statute of limitations period, Reeser worked exclusively as an In-House Sales Representative at the Laurel Crest Resort in Tennessee. (Hicks Dec. ¶14.) During the same time period until her termination in March 2016, Paxton worked only as an In-House Sales Representative and an In-House Sales Specialist. (Hicks Dec. ¶13.) Plaintiffs provide no evidence regarding Tennessee Front-Line Sales Representatives. The only evidence offered by the named Plaintiffs regarding Front-Line Sales Representatives is Paxton's general observations and her statements about her work in the position, which occurred outside the applicable statute of limitations period. Paxton tries to skirt the lack of evidence by conflating Front-Line and In-House Sales Representatives, referring to them as "Sales Representatives." (Paxton Dec. ¶¶11, 13.)

The only evidence from Front-Line Sales Representatives comes from the declarations from the Florida employees. However, as discussed previously, Florida employees should not be included in the conditionally certified class. Absent evidence regarding the Front-Line Representatives in Tennessee, the recommendation to include them in the conditionally-certified class is inappropriate.

III. ***Monroe v. FTS*** **Does Not Support the Magistrate Judge's Recommendation**

The Magistrate Judge relies heavily on the recent Sixth Circuit decision in *Monroe v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017). (Docket No. 41, at 9-10.) However, the facts underlying *Monroe* differ in significant respects from the facts here. In *Monroe*, the Plaintiffs presented evidence there was a "company-wide time-shaving policy that required technicians to systematically underreport their overtime hours." *Monroe*, 860 F.3d at 394. This included evidence that the policy "originated with [Defendant's] corporate office," and that "managers instructed groups of technicians to underreport their hours, and managers testified that corporate ordered them to do so." *Id.*

While the *Monroe* case reached the appellate level after trial, the allegations from the Plaintiffs in this matter do not paint a similar picture. The declarations supporting Plaintiffs' motion for conditional certification do not identify a centralized origin of the alleged FLSA-violating practice, unlike in *Monroe*. Paxton identifies Hicks and Smith as supervisors who did not allow her to record her overtime. (Paxton Dec. ¶13.) Reeser does not identify a specific person or persons as the source of the alleged FLSA violation – indeed he does not articulate a particular mechanism by which he was allegedly denied overtime. (Reeser Dec. ¶¶3-9.) The Florida employees identify Ken Morgan and Simon Gunnon as supervisors who were allegedly responsible for FLSA violations. (*See, e.g.*, Vasquez Dec. ¶15.) The lack of a connection between the source of the alleged violations in Florida and Tennessee is a key distinction from *Monroe*, and further underscores the different factual and employment settings of the putative class members.

Second, the class members (cable installation technicians) in *Monroe* demonstrated "all [technicians] work in the same position, have the same job description, and perform the same job duties: regardless of location." *Monroe*, 860 F.3d at 402. In the present matter, the employees work in different positions with differing job duties. Front-Line Sales Representatives work in Bluegreen's Preview Centers and work exclusively with individuals who have no previous relationship with Bluegreen. (Hicks Dec. ¶¶2-3; Morgan Dec. ¶3.) In-House Sales Representatives work with current Bluegreen owners to market additional Bluegreen Vacation Club points and membership levels. (Hicks Dec. ¶7; Morgan Dec. ¶6.) Even within the In-House Sales Representative position, the duties can vary between location. In Tennessee, there are instance of compensable travel between properties to close transaction that do not exist for In-House Sales Representatives in Florida. (Hicks Dec. ¶7.) In House Sales Specialists are yet another distinct job category who are focused on supervision of In-House Sales Representatives and closing of sales. (Hicks Dec. at ¶10.) Unlike *Monroe*, the current matter includes a variety of positions that do not have the same job description. The differing factual and employment settings of the individuals in this case make it distinct from *Monroe*. It is therefore appropriate to narrow the conditionally-certified class from what is recommended in the Report.

CONCLUSION

Defendants respectfully submit that the Magistrate's Report and Recommendation disregards evidence in the record, is erroneous and/or contrary to the law, and should not be adopted in significant material respects. Neither the Florida employees, nor any Front-Line Sales Representatives should be included in any conditionally-certified collective action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th of August, 2017, the foregoing was filed electronically via ECF and was thereby served on Plaintiff's counsel of record as follows:

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